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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SURGICAL INSTRUMENT SERVICE
COMPANY, INC.,

Plaintiff,

v.

INTUITIVE SURGICAL, INC.,

Defendant.

Case No. 3:21-cv-03496-AMO

**DEFENDANT'S NOTICE OF MOTION
AND MOTION IN LIMINE NO. 4 TO
PRECLUDE PLAINTIFF FROM
OFFERING EVIDENCE OR
ARGUMENT CONCERNING POST-
NOVEMBER 2022 EVENTS**

Date: November 25, 2024
Time: 11:00 a.m.
Courtroom: 10

The Honorable Araceli Martínez-Olguín

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 25, 2024 at 11:00 a.m., or as soon thereafter as this matter may be heard before the Honorable Araceli Martínez-Olguín, District Judge in the United States District Court for the Northern District of California, at 450 Golden Gate Avenue, Courtroom 10, 19th Floor, San Francisco, CA 94102, Defendant Intuitive Surgical, Inc. (“Intuitive”) will and hereby does move the Court for an order prohibiting Plaintiff Surgical Instrument Service Company’s (“SIS”) witnesses and lawyers from offering any evidence or argument about the post-November 10, 2022 time period, other than SIS’s recently produced financial records and RFA responses.

The relief Intuitive seeks through this Motion is authorized by the Federal Rules of Civil Procedure, including but not limited to Rules 26 and 37, and by applicable case law. This Motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities in support thereof, the accompanying Declaration of Paul D. Brachman and attached exhibits, other filings in this matter, and the oral argument of counsel.

PRELIMINARY STATEMENT

When Intuitive sought to take discovery of facts and events occurring after November 2022, SIS objected on various grounds, including that discovery from that period is irrelevant. The Court denied Intuitive’s motion to compel such discovery, with two narrow exceptions, requiring SIS to: (1) produce updated financial records, and (2) respond to a small number of Requests for Admission (“RFAs”). *See* Minute Entry, Dkt. 261. SIS subsequently produced what was ordered by the Court. Its updated financials show that SIS continues to operate a profitable business. Its RFA responses admit that SIS took no steps to compete in the business of modifying (or what SIS calls “repairing”) EndoWrists after November 2022. Having successfully resisted all other discovery as to this period, SIS’s witnesses and lawyers should be precluded from offering any evidence or argument about what happened during that period outside of the limited information that SIS produced in response to the Court’s order.

Any other result would contradict the most basic rules of disclosure under Federal Rule of Civil Procedure 26 and principles of fairness. A party cannot refuse to produce discovery on a matter by claiming it is irrelevant, and then surprise its opponent with undisclosed evidence on the same matter at trial. And here the prejudice to Intuitive of a contrary result would be especially severe. SIS is seeking more than *half a billion dollars* in damages, post-trebling, the majority of which are “lost profits” SIS claims to have incurred *after* November 2022. Yet SIS objected to discovery of any real-world facts or events that occurred during that period, and the Court sustained its objection with limited exceptions as noted. As a result, there is currently no evidence in the record to show that SIS was excluded from competing in any relevant market by any alleged anticompetitive conduct of Intuitive during that period. All that is in the record are *admissions* by SIS that it took no steps to compete after November 2022. Having successfully resisted all other pre-trial discovery about the post-November 2022 time period, SIS should not now be allowed to try to plug any gaps in its proof by offering evidence or argument as to that period at trial.

For these reasons, and as set forth below, Intuitive respectfully submits that the Court should preclude SIS from offering any evidence or argument about the post-November 10, 2022 time period, other than SIS’s recently produced financial records and RFA responses.

RELEVANT BACKGROUND

Intuitive sought to take supplemental discovery from SIS and various third parties to update the record before trial regarding marketplace facts and events since November 10, 2022. *See* Def.’s Mot. for Limited Suppl. Disc., Dkt. 243-1. Intuitive pointed to several key events that undercut SIS’s claim that it was excluded from competing in that time period, including Intuitive’s March 2023 announcement clarifying that its customers were free to purchase any FDA-cleared reset EndoWrist as well as the entry and expansion of other third parties in the same market that SIS alleges was “foreclosed” to competitors. *See id.* at 3–7. SIS opposed Intuitive’s requests. *See* Pl’s Br. Opposing Intuitive’s Mot. to Reopen Disc., Dkt. 246.

At the hearing on Intuitive’s motion to compel this discovery, SIS argued that post-November 2022 facts and events are irrelevant to its claims. SIS’s attorney argued, for example, that Intuitive’s March 2023 announcement regarding FDA clearance is “irrelevant. It really doesn’t add anything here.” Ex. 1 at 15:17-18.¹ He argued as to SIS’s financial condition post-2022, “I don’t think it’s really relevant, Your Honor, because what we’re talking about here is what happened in the market in 2019 and 2020.” *Id.* at 18:12–14. And as to SIS’s efforts, or lack thereof, to compete for X/Xi EndoWrist business, he stated: “our position was, as taken by our experts, is if SIS had had the money to reprogram the X and the Xi in 2019-2020 from ongoing operations from S and Si, then it would have taken about a year to do it. And I think that’s the only relevant inquiry here. It’s not whether we would have had the money to do it in 2023 or 2024. ***That’s not our case.***” *Id.* at 18:16–22 (emphasis added).

While Intuitive maintains that evidence showing that SIS had the opportunity to compete after November 2022 and simply made a choice not to do so is highly relevant and demonstrates why SIS’s liability and damages claims have no merit, the Court largely declined to compel discovery on these matters. The Court required SIS to produce certain “updated financial reports”

¹ All references to “Ex.” refer to exhibits to the Declaration of Paul D. Brachman in Support of Intuitive’s Motions in Limine No. 4 to Preclude Plaintiff from Offering Evidence or Argument Concerning Post-November 2022 Events.

1 and to respond to “limited requests for admissions.” Min. Entry, Dkt. 261. The Court otherwise
2 denied Intuitive’s motion. *See id.*

3 In its responses to the RFAs Intuitive propounded pursuant to the Court’s order, SIS admits
4 that since November 2022, it has not sought FDA clearance for any service, procedure, or
5 technology for resetting or reprogramming the use counter on any EndoWrists; has not taken any
6 steps to sell, distribute, or market any EndoWrists with reset and/or reprogrammed use counters,
7 or any service for resetting or reprogramming the use counter on EndoWrists; and has not
8 developed any service, procedure, or technology for resetting or reprogramming the use counter
9 on X/Xi EndoWrists. Ex. 2 at 3–5. SIS’s financial records show that it remains profitable and has
10 continued to grow its revenues since 2020, but do not reflect any revenues or costs related to SIS’s
11 EndoWrist repair business (or attempts to enter that business). *See* Exs. 3, 4.

12 Nevertheless, SIS continues to assert it is entitled to enormous money damages for 2023,
13 2024, and beyond. SIS’s damages expert, Richard Bero, opined as of the close of expert discovery
14 that SIS was entitled to between \$63.5 million to \$131.4 million in alleged “lost profits” from 2020
15 through 2025 as a result of allegedly anticompetitive conduct by Intuitive, with bulk of that amount
16 coming in the years 2023, 2024, and 2025. *See* Ex. 5 at Schedule 1. And just three days ago, on
17 October 25, 2024—the last business day before pre-trial filings were due in this matter—SIS
18 produced “updated schedules” for Bero’s damages report that substantially *increase* the amount
19 of damages that SIS is seeking in *each year* starting with 2022, and extend SIS’s claimed damages
20 through **2026**. *See* Ex. 6 at Schedule 1. In total, Bero has increased his total lost profit damages
21 estimates by over **\$30 million**, to a range from \$95.5 million to \$169.2 million—for a total of more
22 than **\$500 million** post-trebling. *See id.* SIS has provided no backup data or information
23 supporting these increased calculations.

24 Thus, to recap: SIS took the position that everything that has happened in the real-world
25 marketplace since November 2022 is irrelevant to its claims. SIS refused to engage in discovery
26 about the post-November 2022 period and obtained a Court order largely precluding Intuitive from
27 obtaining such discovery. SIS has admitted it has done nothing to compete in any alleged relevant
28 market since November 2022, despite having an ongoing and profitable business. And SIS

1 contends not only that it is entitled to hundreds of millions of dollars in “lost profits” damages
 2 because it supposedly was excluded from the marketplace after November 2022, but that the
 3 amount of those damages has increased by more than \$30 million since discovery closed.

4 ARGUMENT

5 SIS made a *choice* not to voluntarily produce and to oppose Intuitive’s requests to take
 6 discovery from SIS and anyone else regarding the post-November 2022 time period. Intuitive
 7 moved to compel such discovery and SIS objected, arguing in Court that anything that happened
 8 during that period is *irrelevant* to its claims. *See supra* at 2. It follows as a matter of fundamental
 9 fairness, as well as from the Federal Rules of Civil Procedure, that SIS therefore should be barred
 10 from offering evidence or making arguments to the jury about facts and events from that time
 11 period.²

12 In similar circumstances, courts have estopped parties from litigating issues on which they
 13 successfully opposed discovery. For example, in *Cox v. Continental Casualty Co.*, 703 F. App’x
 14 491, 495 (9th Cir. 2017), the Ninth Circuit affirmed a district court’s decision estopping the
 15 defendant from raising a fraud defense that would have voided an insurance contract, when the
 16 defendant had earlier refused to produce coverage-related documents on the grounds that they were
 17 “immaterial.” Similarly, in *Walker v. Life Insurance Co. of the Southwest*, 2014 WL 12577139,
 18 at *11–12 (C.D. Cal. Apr. 3, 2014), the court granted a motion in limine to prevent the defendant
 19 from offering evidence about the import of three riders to an insurance policy, after the defendant
 20

21 ² Whether the basis for the Court’s ruling was relevance, or whether the Court ruled based on
 22 burden, cost, or the proximity to trial, does not change the outcome on this motion. If SIS wanted
 23 to use evidence from the post-November 2022 time period, it could have and should have
 24 supplemented its discovery responses at any time before now (as, for example, Intuitive did by
 25 voluntarily producing post-November 2022 sales data last May to SIS, *see* Ex. 7 at 26:4–10.) *See*
 26 Fed. R. Civ. P. 26(e)(1) (“A party who has made a disclosure under Rule 26(a)—or who has
 27 responded to an interrogatory, request for production, or requests for admission—must supplement
 28 or correct its disclosure or response: (A) in a timely manner if the party learns that in some material
 respect the disclosure or response is incomplete . . . or (B) as ordered by the court.”); Fed. R. Civ.
 P. 37(c)(1) (“If a party fails to provide information . . . as required by [Rue 26(e)], the party is not
 allowed to use that information . . . at trial, unless the failure was substantially justified or is
 harmless.”). The fact remains, SIS made a decision not to allow discovery of the post-November
 2022 time period, and it should now be barred from offering evidence or argument about that time
 period.

1 had successfully opposed a motion to compel their production on relevance grounds. The Court
2 here similarly should find that SIS is precluded from presenting at trial any evidence regarding the
3 post-November 2022 period, beyond the updated financial records and RFA responses it provided
4 in response to this Court’s recent order. Any other result would be tantamount to allowing SIS to
5 reverse its prior representations to this Court.

6 Moreover, this is not some academic issue in this case, or a matter that should await seeing
7 what SIS does at trial. SIS has already made clear that it intends to ask the jury for hundreds of
8 millions of dollars in “lost profits” damages supposedly incurred after November 2022. Yet, as a
9 result of SIS’s litigation decision to oppose discovery about the post-November 2022 time period,
10 there is no evidence in the record that *Intuitive*’s actions prevented SIS from being able to compete
11 during that period. SIS cannot now try to fix that failure of proof by having its witnesses testify,
12 or its lawyers make arguments, about post-November 2022 facts and events—including arguments
13 that SIS was foreclosed from competing during that time period. To do so, after having
14 successfully resisted the discovery Intuitive sought to take about that time period, would be
15 extremely prejudicial and unfair to Intuitive. Rather, the *only* evidence pertaining to that period
16 that SIS should be allowed to reference at trial is what it admitted in its RFA responses and what
17 its updated financial records show.

18 CONCLUSION

19 For the foregoing reasons, the Court should preclude SIS from offering evidence or
20 argument about the post-November 10, 2022 time period, other than SIS’s recently produced
21 financial records and RFA responses.

1 Dated: October 28, 2024

By: /s/ Kenneth A. Gallo
Kenneth A. Gallo

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CERTIFICATE OF SERVICE

On October 28, 2024, I caused a copy of Defendant's Notice of Motion and Motion in Limine No. 4 to Preclude Plaintiff from Offering Evidence or Argument Concerning Post-November 2022 Events to be electronically served via email on counsel of record for Surgical Instrument Service Company, Inc.

Dated: October 28, 2024

By: /s/ Kenneth A. Gallo
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Attorneys for Defendant Intuitive Surgical, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SURGICAL INSTRUMENT SERVICE
 COMPANY, INC.,

Plaintiff,

v.

INTUITIVE SURGICAL, INC.,
Defendant.

Case No. 3:21-cv-03496-AMO

**DECLARATION OF PAUL D.
 BRACHMAN IN SUPPORT OF
 INTUITIVE'S MOTION IN LIMINE
 NO. 4 TO PRECLUDE PLAINTIFF
 FROM OFFERING EVIDENCE OR
 ARGUMENT CONCERNING POST-
 NOVEMBER 2022 EVENTS**

The Honorable Araceli Martínez-Olguín

1 I, PAUL D. BRACHMAN, declare as follows:

2 1. I am an attorney licensed to practice in New York and the District of Columbia,
3 and am admitted *pro hac vice* to practice before this Court. I am a partner with the law firm of
4 Paul, Weiss, Rifkind, Wharton & Garrison LLP (“Paul, Weiss”), counsel for Intuitive Surgical,
5 Inc. (“Intuitive”) in this matter. I have personal knowledge of the facts set forth herein, and if
6 called to testify, I could and would testify competently hereto.

7
8 2. Attached to this declaration as **Exhibit 1** is a true and correct copy of excerpted
9 pages of the transcript of proceedings before this Court in this matter on September 26, 2024.

10 3. Attached to this declaration as **Exhibit 2** is a true and correct copy of Surgical
11 Instrument Service Company’s (“SIS”) Responses to Intuitive’s Second Set of Requests for
12 Admission and Third Set of Interrogatories, dated October 16, 2024.

13 4. Attached to this declaration as **Exhibit 3** is a true and correct copy of SIS’s
14 Financial Statements and Accountants’ Compilation Report as of and for the years ended
15 December 31, 2021 and 2020, which has not yet been produced with Bates numbers.

16
17 5. Attached to this declaration as **Exhibit 4** is a true and correct copy of SIS’s
18 Financial Statements and Accountants’ Compilation Report as of and for the years ended
19 December 31, 2023 and 2022, which has not yet been produced with Bates numbers.

20 6. Attached to this declaration as **Exhibit 5** is a true and correct copy of excerpted
21 pages of the Second Rebuttal Expert Report of Richard F. Bero dated March 1, 2023, which was
22 previously filed on the docket in this matter with redactions to protect confidential material at
23 ECF No. 229-49.

24
25 7. Attached to this declaration as **Exhibit 6** is a true and correct copy of the updated
26 Schedule 1.0 to the Second Rebuttal to the Expert Report of Richard F. Bero, which was served
27 on October 25, 2024.

1 8. Attached to this declaration as **Exhibit 7** is a true and correct copy of excerpted
2 pages of the transcript of proceedings before this Court in this matter on June 7, 2024.

3 I declare under the penalty of perjury under the laws of the United States that the
4 foregoing is true and correct.

5 Dated: October 28, 2024

By: /s/ Paul D. Brachman.

6 PAUL D. BRACHMAN
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FILER'S ATTESTATION

I, Kenneth A. Gallo, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that the signatory identified above has concurred in this filing.

Dated: October 28, 2024

By: /s/ Kenneth A. Gallo
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EXHIBIT 1

to

**PAUL D. BRACHMAN DECLARATION IN SUPPORT
OF DEFENDANT'S MOTION IN LIMINE NO. 4
TO PRECLUDE PLAINTIFF FROM OFFERING
EVIDENCE OR ARGUMENT CONCERNING POST-
NOVEMBER 2022 EVENTS**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Surgical Instrument Service)	
Company, Inc.,)	No. 3:21-cv-03496-AMO
)	
Plaintiff,)	
)	
vs.)	San Francisco, California
)	September 26, 2024
Intuitive Surgical, Inc.,)	2:28 p.m.
)	
Defendant.)	
)	

BEFORE: THE HONORABLE ARACELI MARTINEZ-OLGUIN, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

VIA HYBRID ZOOM VIDEOCONFERENCE

MOTION HEARING

Official Court Reporter:

Cathy J. Taylor, RMR, CRR, CRC (By Zoom Videoconference)

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Proceedings Reported by Stenographic Court Reporter

Transcript Prepared by Computer-Aided Transcription

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1 clearances.

2 So we have all of those very material facts. And I
3 think it's on that record that we're saying discovery is
4 warranted in this case. It's not just a sort of abstract time
5 has passed and so things have happened.

6 THE COURT: Thank you.

7 Do you want to jump in there at all, Mr. McCaulley?

8 MR. MCCAULLEY: Yeah. Just briefly, Your Honor.

9 You know, I think certainly Intuitive has acknowledged
10 that they knew about all these things in advance. I want to
11 just briefly comment about their announcement to the world in
12 March of 2023 that they would not enforce their contractual
13 provisions against someone who got FDA approval.

14 I think you're -- the Honor -- Your Honor, the Court's
15 already ruled on the fact that the FDA hadn't prohibited repair
16 services and the fact that Intuitive -- you know, it reinforced
17 the need for FDA approval makes the March announcement
18 irrelevant. It doesn't really add anything here. We would
19 argue it's part of their anticompetitive behavior.

20 But, Your Honor, the only thing I would ask is that if
21 there is anything about the Restore case that the Court would
22 like to hear, the recently filed Restore case and how it
23 affects the case, I'm happy to answer as best I can. Or if the
24 Court thinks it's important, we would ask for leave to file a
25 brief on that topic on Monday.

1 MR. MICHAEL: Your Honor, if I could just respond
2 briefly to Mr. McCaulley's argument about the Intuitive
3 announcement from March of 2023.

4 This is the argument that they made in their -- their
5 opposition brief as well. And, respectfully, I think it just
6 doesn't work. First of all, it doesn't match up with the
7 timing of what actually happened here. SIS has tried to argue
8 that Intuitive forced third parties down this supposed FDA path
9 by making this announcement. But we already know from the
10 record that we have that Iconocare and Restore had made the
11 choice to seek FDA clearance for their EndoWrist
12 remanufacturing well before this. They actually started on
13 that path in 2021 and had received the first 510(k) clearance
14 by September of 2022, well before Intuitive made that
15 announcement. And we know why they did that, because, again,
16 we deposed Iconocare witness about this, and he testified, and
17 this is at Brachman Exhibit 15, that Iconocare, together with
18 Restore, chose to seek FDA clearance for marketing reasons
19 because, in his words, it was like a Good Housekeeping seal of
20 approval.

21 And far from engaging in any anticompetitive conduct,
22 as Mr. McCaulley suggests, what Intuitive then said was if any
23 third party has that Good Housekeeping seal of approval for its
24 products for any model of EndoWrist -- which before Iconocare
25 and Restore, no one did -- then Intuitive is not going to stand

1 in the way of hospitals using that product. In other words,
2 Intuitive was saying: If you go and actually prove to the FDA
3 that your reset process of what you want to do with the
4 EndoWrist devices is safe and effective, then have at it. Go
5 compete. Intuitive's contracts are not going to prevent that.

6 And that has nothing to do with the Court's ruling on
7 FDA clearance as a matter of law and what it says about F --
8 SIS's standing. We're not challenging any aspect of that
9 ruling. This doesn't have to do with FDA law and regulations.
10 This has to do with what Intuitive said as a matter of contract
11 to the market and with the -- with the opportunities that third
12 parties, including SIS, had to compete by pursuing that avenue,
13 as Restore did.

14 THE COURT: Mr. McCaulley, let me ask you something
15 that I heard Mr. -- that I think I heard Mr. Michael say.
16 Well, I'll ask you first.

17 And then, Mr. Michael, you can correct me if I'm
18 misstating your point.

19 But I understand the -- the -- I understand you to
20 have said that you need this -- you need this discovery to best
21 defend yourself with regard to the damages that are sought by
22 plaintiff. Is it just for the damages?

23 MR. MICHAEL: It's the damages and their claim of
24 exclusion that underlies those damages. So I think it is a
25 liability issue as well as a damages issue.

1 THE COURT: I thought so, too, which -- so to the
2 extent that I -- I thought I heard you say it was just to
3 damage, I guess, Mr. McCaulley, I -- I had been toying with the
4 idea of asking you if damages -- if -- if your damages is
5 something you would be -- if it just goes to the damages if
6 it's something that you would be willing to limit to make
7 their -- their discovery less rel- -- seem at least moderately
8 less relevant?

9 MR. MCCAULLEY: If it -- if the question was, will
10 we -- I mean, I don't think it's relevant. But the financial
11 condition of SIS, we would produce updated financials if that
12 satis- -- if that was the end of the inquiry. But I don't
13 think it's really relevant, Your Honor, because what we're
14 talking about is what happened in the market in 2019 and 2020.

15 And, as you've already ruled on on all the *Daubert*
16 motions, our position was, as taken by our experts, is if SIS
17 had had the money to reprogram the X and the Xi in 2019-2020
18 from ongoing operations from S and Si, then it would have taken
19 about a year to do it.

20 And I think that's the only relevant inquiry here.
21 It's not whether we would have had the money to do it in 2023
22 or 2024. That's not our case.

23 MR. MICHAEL: And, Your Honor, I -- respectfully, I
24 would suggest it is their case, and they've made it our problem
25 because they're seeking tens of millions of dollars in damages

EXHIBIT 2

to

**PAUL D. BRACHMAN DECLARATION IN SUPPORT
OF DEFENDANT'S MOTION IN LIMINE NO. 4
TO PRECLUDE PLAINTIFF FROM OFFERING
EVIDENCE OR ARGUMENT CONCERNING POST-
NOVEMBER 2022 EVENTS**

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Attorneys for Plaintiff and Counter-Defendant,
SURGICAL INSTRUMENT SERVICE COMPANY, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SURGICAL INSTRUMENT SERVICE
COMPANY, INC.

Plaintiff/Counter-Defendant,

v.

INTUITIVE SURGICAL, INC.,

Defendant/Counterclaimant.

Case No. 3:21-cv-03496-AMO
Honorable Araceli Martínez-Olguín

**PLAINTIFF SIS's RESPONSES TO
DEFENDANT INTUITIVE SURGICAL,
INC.'S SECOND SET OF REQUESTS
FOR ADMISSION AND THIRD SET OF
INTERROGATORIES**

PROPOUNDING PARTY: Defendant Intuitive Surgical, Inc.

RESPONDING PARTY: Plaintiff Surgical Instrument Service Co., Inc.

SET NUMBER: Two of Requests for Admission

Three of Interrogatories

Pursuant to Rules 26 and 36 of the Federal Rules of Civil Procedure Plaintiff Surgical Instrument Service Co., Inc. ("Plaintiff" or "SIS"), by and through the undersigned counsel, hereby responds to Defendant Intuitive Surgical, Inc.'s ("Defendant" or "Intuitive") Second Set of Requests for Admission and Third Set of Interrogatories as follows:

GENERAL OBJECTIONS

Plaintiff makes the following general responses and objections (“General Objections”) to each definition, instruction, and request propounded in Defendant’s second set of requests for admission. These General Objections are hereby incorporated into each specific response. The assertion of the same, similar, or additional objections or partial responses to individual requests does not waive any of Plaintiff’s General Objections.

Plaintiff reserves its right to and will supplement its responses to Defendant’s second set of requests for admission in accordance with Fed. R. Civ. P. 26(e) and the objections as set forth herein are made without prejudice to Plaintiff’s right to assert any additional or supplemental objections pursuant to Fed. R. Civ. P. 26(e).

1. Plaintiff objects to Defendant’s definition of “EndoWrist Instruments” as vague and ambiguous, and further on the basis that determining the scope of “Intuitive’s patented ‘EndoWrist’ technology” necessarily requires legal opinion and testimony.

2. Plaintiff objects to the definitions and instructions accompanying Defendant’s Requests to the extent they seek to impose duties or obligations upon Plaintiff greater than required by the Federal Rules of Civil Procedure and Local Rules for the Northern District of California.

3. Plaintiff objects to each request to the extent that it seeks information that is protected from disclosure by the attorney-client privilege, the attorney work product doctrine or any other applicable privilege, doctrine, or discovery immunity. Plaintiff’s answers do not waive any attorney client privilege and Defendant may not use Plaintiff’s answers to support an argument or a further line of questioning regarding the legal conclusion a request calls for.

4. Plaintiff objects to Defendant’s requests to the extent that they are vague, ambiguous, or seek to impose obligations on Plaintiff that are broader than, or inconsistent with,

1 the Federal Rules of Civil Procedure or the local rules of this Court. Unless indicated otherwise,
2 Plaintiff shall give the terms of these requests their ordinary and plain meanings. If Defendant
3 subsequently assert an interpretation of any request that differs from Plaintiff's understanding,
4 Plaintiff reserves the right to amend or supplement its objections and/or responses.

5
6 5. Plaintiff objects to Defendant's definition of "Customer" as vague and ambiguous.
7 Plaintiff objects to "Customer" including any person who was "marketed" any "SIS services," as
8 such definition is vague, ambiguous, and potentially covers any person who has seen marketing
9 materials of Plaintiff, without regard to whether Plaintiff has engaged with or even knows of such
10 person. Plaintiff further objects to Defendant's definition of "Customer" as including any person
11 who has "inquired about" any "SIS services," as such definition is vague and ambiguous, for
12 example, by lacking any limitation as to whether such person has made an inquiry to Plaintiff,
13 whether Plaintiff has any knowledge of such inquiry, or whether such inquiry is made for the
14 purpose of potentially purchasing SIS services. Plaintiff further objects to "Customers" as being
15 vague and ambiguous in view of Plaintiff and Defendant both being in a market in which the party
16 making a purchasing decision may range from individual surgeons or surgical centers, to hospitals,
17 to entire hospital systems or purchasing organizations.

18
19 **SPECIFIC OBJECTIONS AND RESPONSES**

20
21 **REQUEST FOR ADMISSION NO. 16:** Admit that SIS did not, after November 2022,
22 whether alone or with a third party, seek FDA clearance for any service, procedure, or technology
23 for resetting or reprogramming the use counter on any EndoWrist Instrument.

24 **Response:**

25 Plaintiff objects to this Request because it implies that FDA clearance is required for any
26 service, procedure, or technology for resetting or reprogramming the use counter on any EndoWrist
27

1 Instrument. That is not the case. As the Court stated in the Order Re: Cross Motions for Summary
2 Judgment (Doc. 204 p. 10):

3 "[T]his query is problematic because '[t]he FDCA [(Food, Drug and Cosmetic
4 Act)] leaves no doubt that it is the Federal Government rather than private
5 litigants who are authorized to file suit for noncompliance with the medical
6 device provisions.' *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 349
7 n.4 (2001). Indeed, a private action brought under the Lanham Act may not be
8 pursued when it requires litigating an alleged underlying FDCA violation
9 where the FDA has not itself concluded that a violation exists. *PhotoMedex,*
10 *Inc. v. Irwin*, 601 F.3d 919, 924 (9th Cir. 2010) (affirming grant of summary
11 judgment for defendant on Lanham Act false advertising claim where FDA
12 had not taken a position on defendant's laser's need for Section 510(k)
13 clearance, and claim was based on defendant allegedly misrepresenting that
14 its laser had received FDA clearance). * * * [C]ourts have consistently
15 precluded private actions which require establishing a violation of the FDCA.
16 *See, e.g., Amarin Pharma, Inc. v. International Trade Commission*, 923 F.3d
17 959, 968 (Fed. Cir. 2019) (citing *PhotoMedex*, 601 F.3d at 924, 928) (finding
18 that Lanham Act claim could not stand where it was "based on proving
19 violations of the FDCA and where the FDA has not taken the position that the
20 articles at issue do, indeed, violate the FDCA.").

21 The Court ruled that "SIS has not clearly engaged in unlawful conduct and accordingly may still
22 seek to prove that Intuitive's anticompetitive conduct caused its antitrust injury at trial." Doc. 204
23 p. 16.

24 Subject to the foregoing objection, Admitted.

1
2
3 **REQUEST FOR ADMISSION NO. 17:** Admit that SIS did not, after November 2022,
4 whether alone or with a third party, develop any service, procedure, or technology for resetting or
5 reprogramming the use counter on X/Xi EndoWrist Instruments.
6

7 **Response:**

8
9 Subject to the foregoing General Objections, Admitted.

10 **REQUEST FOR ADMISSION NO. 18:** Admit that SIS took no steps, after November 2022,
11 whether alone or with a third party, to sell, distribute, or market any EndoWrist Instruments with
12 reset and/or reprogrammed use counters, or any service for resetting or reprogramming the use
13 counter on EndoWrist Instruments.
14

15 **Response:**

16
17 Subject to the foregoing General Objections, Admitted.

18 **REQUEST FOR ADMISSION NO. 19:** Admit that SIS has continued, since November
19 2022, to offer its EndoWrist “recovery service” to customers.
20

21 **Response:**

22
23 Subject to the foregoing General Objections, Admitted.

24 **INTERROGATORY**

25 19. If You answer any of Requests for Admission 16 through 19 with anything other
26 than an unqualified admission, state in detail the factual basis for Your answer.
27

28 **No Response Required**

1 Dated: October 16, 2024

McCAULLEY LAW GROUP LLC

2 By: /s/ Richard T. McCaulley

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11 Attorneys for SURGICAL INSTRUMENT SERVICE COMPANY, INC.
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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2024, I caused a copy of the foregoing **PLAINTIFF SIS's RESPONSES TO DEFENDANT INTUITIVE SURGICAL, INC.'S SECOND SET OF REQUESTS FOR ADMISSION AND THIRD SET OF INTERROGATORIES**, to be electronically to be served *via* electronic mail to counsel of record:

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Dated: October 16, 2024

/s/ Joshua Van Hoven

Joshua Van Hoven

EXHIBIT 3

to

**PAUL D. BRACHMAN DECLARATION IN SUPPORT
OF DEFENDANT'S MOTION IN LIMINE NO. 4
TO PRECLUDE PLAINTIFF FROM OFFERING
EVIDENCE OR ARGUMENT CONCERNING POST-
NOVEMBER 2022 EVENTS**



**CERTIFIED PUBLIC ACCOUNTANTS
AND BUSINESS ADVISORS**

**Financial Statements and
Accountants' Compilation Report**
Surgical Instrument Service Co.
**As of and for the Years Ended
December 31, 2021 and 2020**

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ACCOUNTANTS' COMPILATION REPORT

Board of Directors
Surgical Instrument Service Co.
Glendale Heights, Illinois

Management is responsible for the accompanying financial statements of Surgical Instrument Service Co. (an S corporation), which comprise the balance sheets as of December 31, 2021 and 2020, and the related statements of earnings, retained earnings, and cash flows for the years then ended in accordance with accounting principles generally accepted in the United States of America. We have performed the compilation engagements in accordance with Statements on Standards for Accounting and Review Services promulgated by the Accounting and Review Services Committee of the AICPA. We did not audit or review the financial statements nor were we required to perform any procedures to verify the accuracy or completeness of the information provided by management. We do not express an opinion, a conclusion, nor provide any form of assurance on these financial statements.

Management has elected to omit substantially all the disclosures required by accounting principles generally accepted in the United States of America. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the Company's financial position, results of operations, and cash flows. Accordingly, the financial statements are not designed for those who are not informed about such matters.

The supplementary information contained at page 9 is presented for purposes of additional analysis and is not a required part of the basic financial statements. Such information is the responsibility of management. The supplementary information was subject to our compilation engagements. We have not audited or reviewed the supplementary information and do not express an opinion, a conclusion, nor provide any assurance on such information.

We are not independent with respect to Surgical Instrument Service Co.

DHJJ LTD.

St. Charles, Illinois
March 29, 2022

Surgical Instrument Service Co.

BALANCE SHEETS

December 31, 2021 and 2020

	ASSETS	
	2021	2020
CURRENT ASSETS		
Cash	\$ 431,043	\$ 1,946,252
Accounts receivable, net	1,868,720	1,238,399
Income tax refunds	11,139	-
Employee receivables, net	360	739
Inventory	625,271	388,367
Prepaid expenses	81,553	53,105
Total current assets	3,018,086	3,626,862
PROPERTY AND EQUIPMENT		
Automobiles and trucks	887,127	640,846
Furniture and fixtures	46,233	21,237
Leasehold improvements	327,981	344,251
Software	33,560	42,867
Machinery and equipment	1,217,777	1,035,580
	2,512,678	2,084,781
Accumulated depreciation and amortization	(1,332,438)	(1,358,267)
	1,180,240	726,514
OTHER ASSETS		
Assets not in service	24,000	76,433
Security deposits	9,209	3,279
Due from related parties	100,151	98,276
	133,360	177,988
	<u>\$ 4,331,686</u>	<u>\$ 4,531,364</u>

See accountants' report.

Surgical Instrument Service Co.

BALANCE SHEETS

December 31, 2021 and 2020

LIABILITIES AND SHAREHOLDERS' EQUITY			2021	2020
CURRENT LIABILITIES				
Line of credit	\$	34,806	\$	34,806
Note payable - bank, current maturities		37,148		41,317
Accounts payable		172,127		184,128
Accrued expenses		167,163		73,725
Accrued commissions		68,529		49,700
Accrued wages and employee benefits		154,634		114,261
Accrued sales tax		1,923		4,511
Accrued state taxes		4,962		19,039
Deferred payroll taxes		83,143		166,286
Deferred revenue		-		29,160
Total current liabilities		724,435		716,933
LONG-TERM LIABILITIES				
Note payable - bank, net of current maturities		59,593		92,146
Notes payable - shareholders		152,499		152,499
Total long-term liabilities		212,092		244,645
SHAREHOLDERS' EQUITY				
Class A common stock, no par value, 10,000 shares authorized, 1,100 shares issued and outstanding		1,000		1,000
Class B common stock, no par value, nonvoting; 190,000 shares authorized, 20,900 shares issued and outstanding		-		-
Additional paid-in capital		9,000		9,000
Retained earnings		3,385,159		3,559,786
		3,395,159		3,569,786
	\$	4,331,686	\$	4,531,364

See accountants' report.

Surgical Instrument Service Co.

STATEMENTS OF EARNINGS

Years ended December 31, 2021 and 2020

	<u>2021</u>	<u>2020</u>
REVENUES		
Sales, net	\$ 12,404,894	\$ 10,723,942
COST OF REVENUES		
Purchases	4,055,526	3,336,209
Direct labor	<u>2,617,792</u>	<u>1,991,580</u>
	<u>6,673,318</u>	<u>5,327,789</u>
Gross profit	5,731,576	5,396,153
OPERATING EXPENSES	<u>4,819,261</u>	<u>3,634,947</u>
Operating income	912,315	1,761,206
OTHER INCOME (EXPENSE)		
Paycheck Protection Program debt discharge	-	548,000
Other income	-	3,157
Interest income	694	1,174
(Loss) gain on sale of assets	(6,691)	19,581
Interest expense	<u>(11,364)</u>	<u>(19,034)</u>
	<u>(17,361)</u>	<u>552,878</u>
Income before state tax	894,954	2,314,084
STATE TAX	<u>8,132</u>	<u>18,808</u>
NET EARNINGS	<u>\$ 886,822</u>	<u>\$ 2,295,276</u>

See accountants' report.

Surgical Instrument Service Co.

STATEMENTS OF RETAINED EARNINGS

Years ended December 31, 2021 and 2020

	<u>2021</u>	<u>2020</u>
RETAINED EARNINGS, beginning of year	\$ 3,559,786	\$ 1,300,302
Net earnings	886,822	2,295,276
Distributions to shareholders	<u>(1,061,449)</u>	<u>(35,792)</u>
RETAINED EARNINGS, end of year	<u>\$ 3,385,159</u>	<u>\$ 3,559,786</u>

See accountants' report.

Surgical Instrument Service Co.

STATEMENTS OF CASH FLOWS

Years ended December 31, 2021 and 2020

	<u>2021</u>	<u>2020</u>
CASH FLOWS FROM OPERATING ACTIVITIES:		
Net earnings	\$ 886,822	\$ 2,295,276
Adjustments to reconcile net earnings to net cash provided by operating activities:		
Depreciation and amortization	227,498	139,715
Bad debt allowance	10,000	7,500
Loss (gain) on sale of assets	6,691	(19,581)
Paycheck Protection Program debt discharge	-	(548,000)
(Increase) decrease in:		
Accounts receivable	(640,321)	(248,082)
Income tax refunds	(11,139)	-
Employee receivables	379	(739)
Inventory	(236,904)	(222,645)
Prepaid expense	(28,448)	(9,234)
Security deposit	(5,930)	-
Due from related party	(1,875)	-
Increase (decrease) in:		
Accounts payable	(12,001)	32,231
Accrued expenses	93,438	(12,874)
Accrued commissions	18,829	15,484
Accrued wages and employee benefits	40,373	(68,827)
Accrued sales tax	(2,588)	(1,928)
Accrued income taxes	(14,077)	16,899
Deferred payroll tax	(83,143)	166,286
Deferred revenue	(29,160)	29,160
Net cash provided by operating activities	218,444	1,570,641
CASH FLOWS FROM INVESTING ACTIVITIES:		
Purchases of property and equipment	(700,817)	(237,567)
Proceeds from sale of assets	12,902	24,248
Assets not in service	52,433	(76,433)
Net cash used by investing activities	(635,482)	(289,752)
CASH FLOWS FROM FINANCING ACTIVITIES:		
Borrowings on line of credit	-	100,000
Repayments on line of credit	-	(500,000)
Repayment on bank note payable	(36,722)	(53,787)
Paycheck Protection Program funds received	-	548,000
Distributions paid to shareholders	(1,061,449)	(15,792)
Net cash (used) provided by financing activities	(1,098,171)	78,421
NET (DECREASE) INCREASE IN CASH	(1,515,209)	1,359,310
Cash, beginning of year	1,946,252	586,942
Cash, end of year	<u>\$ 431,043</u>	<u>\$ 1,946,252</u>

See accountants' report.

Surgical Instrument Service Co.

STATEMENTS OF CASH FLOWS-continued

Years ended December 31, 2021 and 2020

	<u>2021</u>	<u>2020</u>
SUPPLEMENTAL CASH FLOW INFORMATION:		
Cash paid for:		
Interest	\$ 11,364	\$ 19,034
Taxes	\$ 22,209	\$ 2,081
Schedule of non-cash investing and financing transactions:		
Due from related party reclassified to distributions to shareholders	\$ -	\$ 20,000
Paycheck Protection Program debt forgiveness	\$ -	\$ 548,000

See accountants' report.

SUPPLEMENTARY INFORMATION

Surgical Instrument Service Co.

SCHEDULES OF OPERATING EXPENSES

Years ended December 31, 2021 and 2020

	<u>2021</u>	<u>2020</u>
Salaries and wages	\$ 738,527	\$ 356,501
Officers' salaries	235,404	291,238
Advertising	57,635	6,602
Bad debt expense	12,164	20,000
Bank charges and credit card fees	5,374	5,717
Commissions and sales salaries	1,514,098	1,368,322
Depreciation and amortization	227,498	139,715
Dues and subscriptions	13,509	7,796
Employee benefits	159,636	153,193
Promotional	3,786	1,098
Insurance	109,496	87,102
Legal and professional	172,611	101,522
License and permits	746	2,562
Meals and entertainment	76,978	40,153
Miscellaneous	6,465	5,251
Office expense and supplies	235,833	162,574
Outside services	134,525	86,276
Payroll taxes	387,655	297,608
Postage	2,079	1,613
Property taxes	49,699	45,735
Rent	161,488	138,389
Repairs and maintenance	55,867	69,539
Sales tax	35	1,509
Seminars and conferences	46,379	10,400
Telephone	39,142	38,251
Travel	340,346	173,676
Utilities	32,286	22,605
	<u>\$ 4,819,261</u>	<u>\$ 3,634,947</u>

See accountants' report.

EXHIBIT 4

to

**PAUL D. BRACHMAN DECLARATION IN SUPPORT
OF DEFENDANT'S MOTION IN LIMINE NO. 4
TO PRECLUDE PLAINTIFF FROM OFFERING
EVIDENCE OR ARGUMENT CONCERNING POST-
NOVEMBER 2022 EVENTS**



**CERTIFIED PUBLIC ACCOUNTANTS
AND BUSINESS ADVISORS**

Financial Statements and Accountants' Compilation Report

Surgical Instrument Service Co.

**As of and for the Years Ended
December 31, 2023 and 2022**

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ACCOUNTANTS' COMPILATION REPORT

Board of Directors
Surgical Instrument Service Co.
Glendale Heights, Illinois

Management is responsible for the accompanying financial statements of Surgical Instrument Service Co. (an S corporation), which comprise the balance sheets as of December 31, 2023 and 2022, and the related statements of earnings, retained earnings, and cash flows for the years then ended in accordance with accounting principles generally accepted in the United States of America. We have performed the compilation engagements in accordance with Statements on Standards for Accounting and Review Services promulgated by the Accounting and Review Services Committee of the AICPA. We did not audit or review the financial statements nor were we required to perform any procedures to verify the accuracy or completeness of the information provided by management. We do not express an opinion, a conclusion, nor provide any form of assurance on these financial statements.

Management has elected to omit substantially all the disclosures required by accounting principles generally accepted in the United States of America. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the Company's financial position, results of operations, and cash flows. Accordingly, the financial statements are not designed for those who are not informed about such matters.

The supplementary information contained at page 9 is presented for purposes of additional analysis and is not a required part of the basic financial statements. Such information is the responsibility of management. The supplementary information was subject to our compilation engagements. We have not audited or reviewed the supplementary information and do not express an opinion, a conclusion, nor provide any assurance on such information.

We are not independent with respect to Surgical Instrument Service Co.

DHJJ LTD.

St. Charles, Illinois
April 29, 2024

Surgical Instrument Service Co.

BALANCE SHEETS

December 31, 2023 and 2022

	ASSETS	
	2023	2022
CURRENT ASSETS		
Cash	\$ 1,992,028	\$ 544,811
Accounts receivable, net	2,315,976	2,426,595
Inventory	1,137,851	900,424
Prepaid expenses	76,060	62,974
Total current assets	5,521,915	3,934,804
PROPERTY AND EQUIPMENT		
Automobiles and trucks	1,288,700	1,269,405
Furniture and fixtures	89,263	77,199
Leasehold improvements	439,472	427,455
Software	33,560	33,560
Machinery and equipment	1,490,217	1,427,494
	3,341,212	3,235,113
Accumulated depreciation and amortization	(2,020,085)	(1,645,601)
	1,321,127	1,589,512
OTHER ASSETS		
Operating lease - right of use asset, net	1,139,956	1,366,410
Assets not in service	90,210	90,210
Security deposits	16,009	16,009
Due from related parties	-	100,151
	1,246,175	1,572,780
	<u>\$ 8,089,217</u>	<u>\$ 7,097,096</u>

See accountants' report.

Surgical Instrument Service Co.

BALANCE SHEETS

December 31, 2023 and 2022

LIABILITIES AND SHAREHOLDERS' EQUITY			
	2023	2022	
CURRENT LIABILITIES			
Line of credit	\$ 34,806	\$ 34,806	
Note payable - bank, current maturities	99,389	107,910	
Accounts payable	212,492	207,475	
Accrued expenses	132,976	186,606	
Accrued commissions	25,745	38,338	
Accrued wages and employee benefits	281,209	210,358	
Accrued sales tax	3,247	2,258	
Accrued state taxes	44,825	7,737	
Operating lease liability - current portion	207,875	214,840	
Due to shareholders	-	43,384	
Total current liabilities	1,042,564	1,053,712	
LONG-TERM LIABILITIES			
Note payable - bank, net of current maturities	210,235	310,769	
Notes payable - shareholders	-	152,499	
Operating lease liability - noncurrent portion	958,830	1,166,706	
Total long-term liabilities	1,169,065	1,629,974	
SHAREHOLDERS' EQUITY			
Class A common stock, no par value, 10,000 shares authorized, 1,100 shares issued and outstanding	1,000	1,000	
Class B common stock, no par value, nonvoting; 190,000 shares authorized, 20,900 shares issued and outstanding	-	-	
Additional paid-in capital	9,000	9,000	
Retained earnings	5,867,588	4,403,410	
	5,877,588	4,413,410	
	<u>\$ 8,089,217</u>	<u>\$ 7,097,096</u>	

See accountants' report.

Surgical Instrument Service Co.

STATEMENTS OF EARNINGS

Years ended December 31, 2023 and 2022

	<u>2023</u>	<u>2022</u>
REVENUES		
Sales, net	\$ 18,909,307	\$ 16,323,533
COST OF REVENUES		
Purchases	5,935,958	5,329,114
Direct labor	<u>3,725,463</u>	<u>3,237,120</u>
	<u>9,661,421</u>	<u>8,566,234</u>
Gross profit	9,247,886	7,757,299
OPERATING EXPENSES	<u>7,613,878</u>	<u>6,700,003</u>
Operating income	1,634,008	1,057,296
OTHER INCOME (EXPENSE)		
Interest income	16,827	1,210
Loss on sale of assets	-	(8,444)
Interest expense	<u>(35,096)</u>	<u>(21,604)</u>
	<u>(18,269)</u>	<u>(28,838)</u>
Income before state tax	1,615,739	1,028,458
STATE TAX	<u>43,812</u>	<u>10,207</u>
NET EARNINGS	<u>\$ 1,571,927</u>	<u>\$ 1,018,251</u>

See accountants' report.

Surgical Instrument Service Co.

STATEMENTS OF RETAINED EARNINGS

Years ended December 31, 2023 and 2022

	<u>2023</u>	<u>2022</u>
RETAINED EARNINGS, beginning of year	\$ 4,403,410	\$ 3,385,159
Net earnings	1,571,927	1,018,251
Distributions to shareholders	<u>(107,749)</u>	<u>-</u>
RETAINED EARNINGS, end of year	<u>\$ 5,867,588</u>	<u>\$ 4,403,410</u>

See accountants' report.

Surgical Instrument Service Co.

STATEMENTS OF CASH FLOWS

Years ended December 31, 2023 and 2022

	<u>2023</u>	<u>2022</u>
CASH FLOWS FROM OPERATING ACTIVITIES:		
Net earnings	\$ 1,571,927	\$ 1,018,251
Adjustments to reconcile net earnings to net cash provided by operating activities:		
Depreciation and amortization	374,484	313,608
Reduction in operating lease - right of use asset	226,454	184,997
Bad debt allowance	15,000	10,000
Loss on sale of assets	-	8,444
(Increase) decrease in:		
Accounts receivable	95,619	(567,875)
Income tax refunds	-	11,139
Employee receivables	-	360
Inventory	(237,427)	(275,153)
Prepaid expense	(13,086)	18,579
Security deposit	-	(6,800)
Due from related parties	100,151	-
Increase (decrease) in:		
Accounts payable	5,017	35,348
Accrued expenses	(53,630)	19,443
Operating lease liability	(214,841)	(169,861)
Accrued commissions	(12,593)	(30,191)
Accrued wages and employee benefits	70,851	55,724
Accrued sales tax	989	335
Accrued state taxes	37,088	2,775
Deferred payroll tax	-	(83,143)
Due to shareholders	(43,384)	43,384
Net cash provided by operating activities	1,922,619	589,364
CASH FLOWS FROM INVESTING ACTIVITIES:		
Purchases of property and equipment	(106,099)	(731,324)
Acquisition of assets not in service	-	(66,210)
Net cash used by investing activities	(106,099)	(797,534)
CASH FLOWS FROM FINANCING ACTIVITIES:		
Proceeds from bank note payable	-	360,118
Repayment on bank note payable	(109,055)	(38,180)
Repayment on notes payable - shareholders	(152,499)	-
Distributions paid to shareholders	(107,749)	-
Net cash provided (used) by financing activities	(369,303)	321,938
NET INCREASE IN CASH	1,447,217	113,768
Cash, beginning of year	544,811	431,043
Cash, end of year	<u>\$ 1,992,028</u>	<u>\$ 544,811</u>

See accountants' report.

Surgical Instrument Service Co.

STATEMENTS OF CASH FLOWS-continued

Years ended December 31, 2023 and 2022

	<u>2023</u>	<u>2022</u>
SUPPLEMENTAL CASH FLOW INFORMATION:		
Cash paid for:		
Interest	\$ 32,572	\$ 21,604
Taxes	\$ 6,487	\$ 7,432
Supplemental cash flow information related to leases:		
Right-of-use-asset obtained in exchange for incurring operating lease liability	\$ -	\$ 1,551,407
Operating cash outflows for operating leases	\$ 282,283	\$ 236,756

See accountants' report.

SUPPLEMENTARY INFORMATION

Surgical Instrument Service Co.

SCHEDULES OF OPERATING EXPENSES

Years ended December 31, 2023 and 2022

	2023	2022
Salaries and wages	\$ 1,364,664	\$ 1,175,282
Officers' salaries	349,573	357,000
Advertising	11,803	19,773
Bad debt expense	15,000	9,711
Bank charges and credit card fees	12,512	9,549
Commissions and sales salaries	2,100,883	1,799,479
Depreciation and amortization	374,484	313,608
Donations	2,000	-
Dues and subscriptions	12,211	13,682
Employee benefits	225,854	190,650
Promotional	125	4,202
Insurance	175,055	139,196
Legal and professional	508,965	362,106
License and permits	420	351
Meals and entertainment	137,530	109,809
Office expense and supplies	405,389	399,601
Outside services	143,670	152,264
Payroll taxes	608,382	516,593
Postage	2,328	1,914
Property taxes	48,543	50,134
Rent	299,017	271,799
Repairs and maintenance	67,191	63,683
Retirement plan	30,716	-
Sales tax	-	1,870
Seminars and conferences	39,838	84,334
Telephone	52,588	54,747
Travel	536,852	536,301
Utilities	88,285	62,365
	<u>\$ 7,613,878</u>	<u>\$ 6,700,003</u>

See accountants' report.

EXHIBIT 5

to

**PAUL D. BRACHMAN DECLARATION IN SUPPORT
OF DEFENDANT'S MOTION IN LIMINE NO. 4
TO PRECLUDE PLAINTIFF FROM OFFERING
EVIDENCE OR ARGUMENT CONCERNING POST-
NOVEMBER 2022 EVENTS**

HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SURGICAL INSTRUMENT SERVICE
COMPANY, INC.,

Plaintiff / Counterclaim Defendant,

v.

INTUITIVE SURGICAL, INC.,

Defendant / Counterclaim Plaintiff.

Case No.: 3:21-cv-03496-VC

Second Rebuttal Expert Report of Richard F. Bero, CPA, CVA
March 1, 2023

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

Second Rebuttal Schedules Index

Schedule #	Title
Second Rebuttal Schedule 1.0	Damages Summary
Second Rebuttal Schedule 2.0	Scenario 1 - Discounted Lost Profits: In-house Model
Second Rebuttal Schedule 2.1	Scenario 1 - Undiscounted Lost Profits: In-house Model
Second Rebuttal Schedule 2.2	Scenario 1 - Lost EndoWrist Repair Units
Second Rebuttal Schedule 3.0	Scenario 1 - Discounted Lost Profits: Distributor Model
Second Rebuttal Schedule 3.1	Scenario 1 - Undiscounted Lost Profits: Distributor Model
Second Rebuttal Schedule 4.0	Scenario 2 - Discounted Lost Profits: In-house Model (2 Year X/Xi Delay)
Second Rebuttal Schedule 4.1	Scenario 2 - Undiscounted Lost Profits: In-house Model (2 Year X/Xi Delay)
Second Rebuttal Schedule 4.2	Scenario 2 - Lost EndoWrist Repair Units (2 Year X/Xi Delay)
Second Rebuttal Schedule 4.3	Scenario 2 - Discounted Lost Profits: In-house Model (1 Year X/Xi Delay)
Second Rebuttal Schedule 4.4	Scenario 2 - Undiscounted Lost Profits: In-house Model (1 Year X/Xi Delay)
Second Rebuttal Schedule 4.5	Scenario 2 - Lost EndoWrist Repair Units (1 Year X/Xi Delay)
Second Rebuttal Schedule 5.0	Scenario 2 - Discounted Lost Profits: Distributor Model (2 Year X/Xi Delay)
Second Rebuttal Schedule 5.1	Scenario 2 - Undiscounted Lost Profits: Distributor Model (2 Year X/Xi Delay)
Second Rebuttal Schedule 5.2	Scenario 2 - Discounted Lost Profits: Distributor Model (1 Year X/Xi Delay)
Second Rebuttal Schedule 5.3	Scenario 2 - Undiscounted Lost Profits: Distributor Model (1 Year X/Xi Delay)
Second Rebuttal Schedule 6.0	Intuitive's U.S. EndoWrist Instrument Units - Actual and Forecasted: 2014 - 2025
Second Rebuttal Schedule 7.0	Estimated EndoWrist Expiration Rates: 2018 - 2021
Second Rebuttal Schedule 8.0	Potential EndoWrist Instrument Units, Net Sales Dollars and Average Selling Price by System (Using Intuitive Sales Volumes and September 2019 Vizient Amended Agreement Prices): 2018 - June 2022
Second Rebuttal Schedule 8.1	Potential EndoWrist Instrument Units, Net Sales Dollars and ASP by Product (Instrument Number) - da Vinci S/Si (Using Intuitive Sales Volumes and September 2019 Vizient Amended Agreement Prices): 2018 - June 2022
Second Rebuttal Schedule 8.2	Potential EndoWrist Instrument Units, Net Sales Dollars and ASP by Product (Instrument Number) - da Vinci X/Xi (Using Intuitive Sales Volumes and September 2019 Vizient Amended Agreement Prices): 2018 - June 2022
Second Rebuttal Schedule 9.0	SIS's Estimated EndoWrist Instrument Repair Cost:2020 - June 2022
Second Rebuttal Schedule 9.1	Intuitive's "Top 5" X/Xi EndoWrist Instrument Units:2018 - June 2022

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Second Rebuttal Schedules Index

Schedule #	Title
Second Rebuttal Schedule 10.0	SIS's Estimated Interceptor Chip Cost (Based on Rebotix's Sales to Restore)
Second Rebuttal Schedule 10.1	Rebotix Sales to SIS: June 27, 2019 - November 21, 2019
Second Rebuttal Schedule 11.0	Potential EndoWrist Instrument Units, Costs and Costs per Unit by System (Using Intuitive Sales Volumes and Rebotix Pricing): 2018 - June 2022
Second Rebuttal Schedule 11.1	Potential EndoWrist Instrument Units, Costs and Costs per Unit by Product (Instrument Number) - da Vinci S/Si (Using Intuitive Sales Volumes and Rebotix Pricing): 2018 - June 2022
Second Rebuttal Schedule 11.2	Potential EndoWrist Instrument Units, Costs and Costs per Unit by Product (Instrument Number) - da Vinci X/Xi (Using Intuitive Sales Volumes and Rebotix Pricing): 2018 - June 2022
Second Rebuttal Schedule 12.0	SIS's EndoWrist Instrument Sales Prices and Costs (from Rebotix) - da Vinci S/Si
Second Rebuttal Schedule 12.1	SIS's EndoWrist Instrument Sales Prices and Costs (from Rebotix) - da Vinci X/Xi
Second Rebuttal Schedule 12.2	SIS's EndoWrist Instrument Sale Price vs Intuitive Sales Price - da Vinci S/Si
Second Rebuttal Schedule 13.0	Intuitive's EndoWrist Instrument Units, Net Sales Dollars and Average Selling Price by System: 2014 - June 2022
Second Rebuttal Schedule 13.1	Intuitive's EndoWrist Instrument Units and Net Sales Dollars by Product (Instrument Number) - da Vinci S/Si: 2014 - June 2022
Second Rebuttal Schedule 13.2	Intuitive's EndoWrist Instrument Units and Net Sales Dollars by Product (Instrument Number) - da Vinci X/Xi: 2014 - June 2022
Second Rebuttal Schedule 14.0	SIS's EndoWrist Instrument Repair Summary
Second Rebuttal Schedule 15.0	SIS's Financial Statements: 2019 - October 2021
Second Rebuttal Schedule 15.1	SIS's Detailed SGA: 2019 - October 2021
Second Rebuttal Schedule 16.0	Intuitive EndoWrist Instrument Average Selling Price, Units and Net Sales Dollars: 2020 - 2025
Second Rebuttal Schedule 16.1	Lanham Act Based on Scenario 2 - Unenforceable Contracts(2 Year X/Xi Delay): 2020 - 2025
Second Rebuttal Schedule 16.2	Lanham Act Based on Scenario 2 - Unenforceable Contracts(1 Year X/Xi Delay): 2020 - 2025

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Damages Summary

Second Rebuttal Schedule 1.0

	2020	2021	2022	2023	2024 (discounted)	2025 (discounted)	Total
Lost profits							
<u>Scenario 1 - Illegal Encryption</u>							
[A] In-house model	\$6,235,557	\$21,765,377	\$30,999,702	\$35,400,982	\$28,213,690	\$8,767,326	\$131,382,634
[B] Distributor model	\$5,573,947	\$19,392,500	\$27,440,979	\$31,335,614	\$24,973,286	\$7,760,334	\$116,476,660
<u>Scenario 2 - Unenforceable Contracts</u>							
<u>2 Year X/Xi delay</u>							
[C] In-house model	\$958,569	\$1,359,572	\$7,179,842	\$25,377,682	\$28,213,690	\$8,767,326	\$71,856,681
[D] Distributor model	\$837,634	\$1,179,972	\$6,357,184	\$22,463,639	\$24,973,286	\$7,760,334	\$63,572,049
<u>1 Year X/Xi delay</u>							
[E] In-house model	\$958,569	\$7,481,387	\$22,338,002	\$35,400,982	\$28,213,690	\$8,767,326	\$103,159,956
[F] Distributor model	\$837,634	\$6,643,796	\$19,774,204	\$31,335,614	\$24,973,286	\$7,760,334	\$91,324,868
Lanham Act							
[G] Scenario 2 - 2 year X/Xi delay	\$3,274,156	\$4,775,564	\$25,742,312	\$91,369,970	\$101,623,818	\$31,582,076	\$258,367,896
[H] Scenario 2 - 1 year X/Xi delay	\$3,274,156	\$26,905,717	\$80,352,656	\$127,480,940	\$101,623,818	\$31,582,076	\$371,219,363

NOTES / SOURCES:

Note: Any minor differences are due to rounding.

[A] Per Second Rebuttal Schedule 2.0.

[B] Per Second Rebuttal Schedule 3.0.

[C] Per Second Rebuttal Schedule 4.0.

[D] Per Second Rebuttal Schedule 5.0.

[E] Per Second Rebuttal Schedule 4.3.

[F] Per Second Rebuttal Schedule 5.2.

[G] Per Second Rebuttal Schedule 16.1.

[H] Per Second Rebuttal Schedule 16.2.

EXHIBIT 6

to

**PAUL D. BRACHMAN DECLARATION IN SUPPORT
OF DEFENDANT'S MOTION IN LIMINE NO. 4
TO PRECLUDE PLAINTIFF FROM OFFERING
EVIDENCE OR ARGUMENT CONCERNING POST-
NOVEMBER 2022 EVENTS**

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Second Rebuttal Schedule 2.2 - Updated	Scenario 1 - Lost EndoWrist Repair Units
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Second Rebuttal Schedule 3.1 - Updated	Scenario 1 - Undiscounted Lost Profits: Distributor Model
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Second Rebuttal Schedule 4.4 - Updated	Scenario 2 - Undiscounted Lost Profits: In-house Model (1 Year X/Xi Delay)
Second Rebuttal Schedule 4.5 - Updated	Scenario 2 - Lost EndoWrist Repair Units (1 Year X/Xi Delay)
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Second Rebuttal Schedules Index - Updated

Schedule #	Title
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Second Rebuttal Schedule 9.1 - Updated	Intuitive's "Top 5" X/Xi EndoWrist Instrument Units:2018 - March 2024
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Second Rebuttal Schedule 15.0	SIS's Financial Statements: 2019 - October 2021
Second Rebuttal Schedule 15.1 - Updated	SIS's Detailed SGA: 2019 - October 2021

Damages Summary

Second Rebuttal Schedule 1.0 - Updated

	2020	2021	2022	2023	2024	2025 (discounted)	2026 (discounted)	Total
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Lost profits

Scenario 1 - Illegal Encryption

[A]	In-house model	\$6,235,557	\$21,765,377	\$32,616,631	\$37,137,711	\$38,057,760	\$25,690,943	\$7,918,895	\$169,422,874
[B]	Distributor model	\$5,573,947	\$19,392,500	\$28,903,939	\$32,913,095	\$33,640,800	\$22,709,268	\$6,999,833	\$150,133,382

Scenario 2 - Unenforceable Contracts

2 Year X/Xi delay

[C]	In-house model	\$958,569	\$1,359,572	\$7,395,300	\$26,559,665	\$38,057,760	\$25,690,943	\$7,918,895	\$107,940,704
[D]	Distributor model	\$837,634	\$1,179,972	\$6,549,444	\$23,537,425	\$33,640,800	\$22,709,268	\$6,999,833	\$95,454,376

1 Year X/Xi delay

[E]	In-house model	\$958,569	\$7,481,387	\$23,445,641	\$37,137,711	\$38,057,760	\$25,690,943	\$7,918,895	\$140,690,906
[F]	Distributor model	\$837,634	\$6,643,796	\$20,775,389	\$32,913,095	\$33,640,800	\$22,709,268	\$6,999,833	\$124,519,815

NOTES / SOURCES:

Note: Any minor differences are due to rounding.

Note: I have removed Lanham Act damages from this update as I understand Lanham Act damages are no longer at issue.

- [A]** Per Second Rebuttal Schedule 2.0 - Updated.
- [B]** Per Second Rebuttal Schedule 3.0 - Updated.
- [C]** Per Second Rebuttal Schedule 4.0 - Updated.
- [D]** Per Second Rebuttal Schedule 5.0 - Updated.
- [E]** Per Second Rebuttal Schedule 4.3 - Updated.
- [F]** Per Second Rebuttal Schedule 5.2 - Updated.

EXHIBIT 7

to

**PAUL D. BRACHMAN DECLARATION IN SUPPORT
OF DEFENDANT'S MOTION IN LIMINE NO. 4
TO PRECLUDE PLAINTIFF FROM OFFERING
EVIDENCE OR ARGUMENT CONCERNING POST-
NOVEMBER 2022 EVENTS**

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 Before The Honorable Araceli Martinez-Olguin, District Judge
4
5 SURGICAL INSTRUMENT SERVICE)
6 COMPANY, INC.,)
7 Plaintiff,)
8 vs.) No. C 21-03496-AMO
9 INTUITIVE SURGICAL, INC.,) Related Case:
10 Defendants.) No. C 21-03825-AMO

11 San Francisco, California
12 Friday, June 7, 2024

13 TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
14 RECORDING 2:22 - 3:06 = 44 MINUTES

15 APPEARANCES:

16 For Plaintiffs:

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22 Spector Roseman & Kodroff,
23 P.C.
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BY: JEFFREY J. CORRIGAN, ESQ.
CHRIS BATEMAN, ESQ.

(APPEARANCES CONTINUED ON NEXT PAGE)

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19 Transcriber
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22
23
24
25

1 ask my courtroom deputy to put holds there. I will hold it
2 for you all, but it -- we can -- we can figure out whether
3 or not this is right. What I can do is plan to do your
4 pretrial conference on November 25th at 11:00 a.m., and then
5 we can start trial on January 6, 2025, and I'll set that for
6 20 days because I got the sense that, Mr. McCaulley, your
7 estimate was 14 days, excluding a bunch of other things.
8 And I got SI -- and I got Intuitive's suggestion that it was
9 20 days, including most of those things. So, I've -- that's
10 where I can fit in a 20-day trial. So --

11 MR. MCCAULLEY: Okay.

12 THE COURT: -- I just -- before you respond to
13 everything he says and -- and try to argue to tell me to do
14 it sooner, I just -- I want you to know a 20-day trial,
15 that's where I can -- that's where I can conceivably fit it
16 in right now. It's that or April. So, that was -- so,
17 please, go ahead. Please, please. But in the end --

18 MR. MCCAULLEY: Your Honor --

19 THE COURT: -- I feel like -- go ahead.

20 MR. MCCAULLEY: SIS then requests a trial on
21 January 6th. I want to feel like I'm winning. So, yeah.
22 And Mr. Gallo and I have had several conversations about
23 this, and there's no indication, just like with Ms. Winner
24 before, that the parties can't work together. I will tell
25 you this, your Honor. My client is definitely definitely a

1 short David against Goliath, and reopening discovery in a
2 broad way for the next eight months will bury us. So, you
3 know, we want to have some certainty about the record we've
4 created, the record that we've relied on. I have asked my
5 damages expert to prepare updated numbers, but it's simply
6 updating his report, not new opinions. I expect to have it
7 to Mr. Gallo in the next few weeks. He was kind enough and
8 his team was kind enough to send us updated numbers. I
9 think anticipating the request -- he didn't even make us ask
10 for it -- they sent over the -- the numbers, and we would
11 definitely update our numbers, and we anticipate that, but
12 reopening discovery would be a huge blow to my client
13 financially, your Honor. And we are -- you know, we're
14 happy to go to trial. We're happy to -- to square off. But
15 their team and the resources are -- have buried us and will
16 continue to bury us if we have significant discovery.

17 I'm happy to work with Mr. Gallo. The one thing we did
18 talk about was updating some testimony that was kind of
19 rambling from witnesses, and -- and, you know, what I was
20 going to propose to him is we can maybe summarize those so
21 we didn't have to retake them, to make it less excruciating
22 for the jury. But new issues, new -- redeposing a bunch of
23 witnesses, there were so many depositions in this case. It
24 almost broke my client the first time around. I'm not sure
25 we can do it again.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SURGICAL INSTRUMENT SERVICE
COMPANY, INC.

Plaintiff/Counter-Defendant,

v.

INTUITIVE SURGICAL, INC.,

Defendant/Counterclaimant.

Case No. 3:21-cv-03496-AMO

Honorable Araceli Martínez-Olguín

**PLAINTIFF SIS' OPPOSITION TO
INTUITIVE'S MOTION IN LIMINE #4**

In its Motion In Limine No. 4 ("Mtn No. 4"), Defendant, Intuitive Surgical, Inc. ("Intuitive") seeks an order prohibiting Plaintiff, Surgical Instrument Service Company, Inc's ("SIS"), including its witnesses and lawyers, from:

"offering any evidence or argument about the post-November 10, 2022 time period, other than SIS's recently produced financial records and RFA responses." Mtn No. 4 at p. i.

**SIS DOES NOT OPPOSE THE RELIEF INTUITIVE SEEKS
PROVIDED CERTAIN EXCLUSIONS ARE INCLUDED
TO MODIFY THE SCOPE OF THE PROHIBITION**

SIS does not oppose the relief sought by Intuitive provided the following exclusions and

1 additions are included to modify the scope of the provision to make it more even-handed and fair:

2 (1) the prohibition against offering any evidence or argument about what happened after
3 November 2022 outside of the limited information that SIS produced in response to the Court's
4 order should also be applied to Intuitive, along with its witnesses and lawyers;

5 (2) SIS's damages expert's updated Schedules appended to his expert report based upon
6 financial data produced by the parties after the close of discovery are not subject to the prohibition
7 against offering any evidence or argument about what the "but for" world would look like after
8 November 2022;

9 (3) SIS's damages expert is not prohibited from testifying regarding SIS's lost profits in
10 the "but-for" world corresponding to the period after November 2022 through 2026; and

11 (4) information available after November 10, 2022 which is disclosed or covered in the
12 parties' expert reports and which the parties' had a full opportunity to explore through the
13 subsequent expert deposition process are not subject to the prohibition against offering any
14 evidence or argument about what happened after November 2022.

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17 **SIS'S RESPONSE TO INTUITIVE'S PRELIMINARY STATEMENT --**
18 **RELEVANT BACKGROUND AND ARGUMENT SECTIONS**

19 Intuitive suggests that SIS has refused to produce discovery on a matter by claiming it is
20 irrelevant, and then plans to surprise Intuitive with undisclosed evidence on the same matter at trial.
21 Mtn No. 4 at p. 1. That is not at all accurate. Everything that SIS will present during its case-in-
22 chief to the jury during trial is known to Intuitive. SIS's live witness testimony and testimony of
23 witnesses by deposition has been disclosed to Intuitive. There are no surprises in the trial exhibits
24 SIS has on the list provided to Intuitive. SIS's expert witnesses will be testifying to the opinions
25 that were fully disclosed in their expert reports and which Intuitive explored extensively during the
26 period for expert deposition discovery.

27
28 Intuitive adds the gratuitous, self-serving, and erroneous assertion that "there is currently

1 no evidence in the record to show that SIS was excluded from competing in any relevant market
2 by any alleged anticompetitive conduct of Intuitive during that period." Mtn No. 4 at pp. 1:20-22;
3 5:10-11. SIS disagrees. There is, however, no evidence in the record to show that Intuitive stopped,
4 modified or otherwise changed its anticompetitive conduct after that conduct crushed SIS's effort
5 to establish its refurbishment and repair service for EndoWrist instruments. Accordingly, the
6 anticompetitive effect of the barriers to entry that Intuitive's anticompetitive conduct created, which
7 shut down SIS business in 2019 and 2020 continued to exclude SIS from competing in the
8 EndoWrist repair and replacement aftermarket from that time to the present.

10 In its "Relevant Background" section, Intuitive argues that its "March 2023 announcement
11 clarifying that its customers were free to purchase any FDA-cleared reset EndoWrist" undercuts
12 "SIS's claim that it was excluded from competing in that [post November 2022] time period." Mtn
13 No. 4 at p. 2:4-8. That is simply not true.

15 Additionally, it appears that Intuitive wants to play by different rules regarding what post
16 November 2022 evidence it wants to present to the jury. For example, Intuitive apparently intends
17 to present evidence and argument to the jury to show "that SIS had the opportunity to compete after
18 November 2022 and simply made a choice not to do so" in order to demonstrate "why SIS's liability
19 and damages claims have no merit". Mtn No. 4 at p. 2:21-24. Yet, Intuitive asks that this Court
20 require SIS to remain mute in the face of such evidence and refrain from telling the jury anything
21 about what the "but-for" world would look like in the period after November 2022 through 2026.
22 Specifically, Intuitive asks that SIS "be barred from offering evidence or making arguments to the
23 jury about facts and events from that [post November 2022] time period." Mtn No. 4 at p. 4:9-11.
24 Such a result would contradict the most basic principles of fairness. Accordingly, SIS requests that
25 the Court incorporate the above-recited additional provisions in any Order the Court enters
26 resolving this motion in limine.
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1 Intuitive's "Argument" is essentially a rehash of the arguments it presented in its motion to
2 reopen discovery. It is also based upon the fallacious allegation that SIS intends to use evidence
3 from the post-November 2022 time period. Mtn No. 4 at p. 4 n.2. SIS has no such intention. SIS
4 does however intend to present expert testimony from Mr. Bero about his various damages models
5 that address the but-for world after November 2022 and form the basis for his lost profits damages
6 calculations. It appears that Intuitive is attempting to use this motion as a vehicle to preclude SIS
7 from presenting that testimony and related argument to the jury. As such, Intuitive's ploy is nothing
8 more than a renewed attack on the admissibility of Mr. Bero's expert testimony which was rejected
9 and put to rest by this Court's denial of Intuitive's Daubert motion.
10

11 Intuitive's position that SIS cannot have "its witnesses testify, or its lawyers make arguments,
12 about post-November 2022 facts and events—including arguments that SIS was foreclosed from
13 competing during that [post November 2022] time period" is absurd and is in no way compelled by
14 this Court's denial of Intuitive's motion to reopen discovery in this case. Simply put, it is undisputed
15 that Intuitive's anti-competitive conduct crushed the repair market in which SIS operates in 2019
16 and 2020. Intuitive does not dispute that it has and would continue that conduct with respect to
17 SIS's business to this day, even with its manufactured and self-serving March 2023 statement.
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CONCLUSION

For the foregoing reasons, SIS respectfully requests that in the interest of ensuring a fair and level playing field for the trial, that the Court include the proposed additional terms and exclusions with any Order entered granting Intuitive's Motion in Limine No. 4.

Dated: November 7, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2024, I caused a copy of the foregoing
PLAINTIFF SIS's OPPOSITION TO INTUITIVE'S MOTION IN LIMINE #4, to be
electronically to be served *via* electronic mail to counsel of record:

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FILER'S ATTESTATION

I, Kenneth A. Gallo, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that the signatories identified above have concurred in this filing.

Dated: November 11, 2024

By: /s/ Kenneth A. Gallo

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